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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1218

ROBERT LIEBERMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JACK KRANIS,
Counsel for Petitioner.

A. HARRY WEISSMAN,
Of Counsel

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1218

ROBERT LIEBERMAN,

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THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I

Summary Statement of the Matter Involved

The Information was filed on August 31st, 1944 in the District Court for the Eastern District of New York against Robert Lieberman and James Nolan, defendants therein. They charged the defendants for selling a commodity, to wit, chucks, ribs and hinds of beef in violation of a price

schedule effective in accordance with the provisions of Section 2(a) of the Emergency Price Control Act of 1942. Defendant was arraigned on September 11, 1944, and admitted to bail in the sum of $1,000.00. No trial was had. The defendant Robert Lieberman entered a plea of guilty to Counts #2 and #3 of the Information on May 23rd, 1945, and on May 26th, 1945, moved in arrest of judgment, which was denied on May 31st, 1945. Sentence was imposed by Hon. Grover M. Moscowitz, United States District Judge, on June 5th, 1945, sentencing the defendant, Robert Lieberman, to serve sixty (60) days imprisonment and a Twenty-Five Hundred ($2,500.00) Dollar fine on Count #2 and on Count #3 to serve six (6) months imprisonment, which was suspended and he was placed on probation for eighteen months. At that time a motion was made to vacate the sentence and set aside the judgment, which was denied. The remaining counts were dismissed on the motion of the Government. A Nolle Prosequi was entered by the Government as to the defendant James Nolan. A Notice of appeal was filed by the defendant, Robert Lieberman, June 8, 1945, and bail was fixed in the sum of $1,000.00 and he was released pending appeal on such bail and in addition a bond was posted in the sum of $2,500 for the payment of the fine on Count #2.

The petitioner herein appealed from the judgment to the Circuit Court of Appeals for the Second Circuit, which affirmed with an opinion (See Appendix—"A").

Questions Presented

1. Do the facts as set forth in Counts 2 and 3 of the Information constitute or allege an offense against the United States in that (a) Maximum Price Regulation No. 169 was a price regulation relating to a commodity which was and is an agricultural product, to wit: Beef or dressed Beef?

2. Was Maximum Price Regulation No. 169 rescinded and rendered ineffectual and inoperative on or about January 10th, 1945, by directive #28 issued that day by Director of Office of Economic Stabilization?

3. Was the said Maximum Price Regulation rescinded and rendered ineffectual and inoperative by Maximum Price Regulation No. 574 promulgated by the Office of Price Administration? - - -

4. Was the Maximum Price Regulation No. 169 invalid on its face in that it failed to set forth or transcribe the method and manner of stating a dollar and cents price control of the commodity mentioned by the Office of Price Administration?

5. Has the Emergency Court of Appeals since the rescission of the Maximum Price Regulation No. 169 on or about January 10th, 1945, repeatedly and continually failed and refused to pass upon the validity of the Maximum Price Regulation No. 169?

6. Has the Administrator of the Office of Price Administration in promulgating Maximum Price Regulation No. 169 failed to comply with the Emergency Price Control Act of 1942 as amended June 30th, 1944?

7. Is Maximum Price Regulation No. 169 indefinite, uncertain, arbitrary, discriminatory and unconstitutional in depriving the defendant of his property without due compensation and in violation of article 5 and article 14 of the Amendments to the Constitution of the United States?

Reasons Relied Upon For Allowance of Writ

1. The great importance of the Emergency Price Control Act of 1942 and the effect of the Stabilization Act of 1942, amendatory thereof, to the United States, to the business

world and legal profession, and the need of an authoritative opinion, particularly as to the conflicting penal provisions of these Acts, calls for a construction of the Act by this Court.

2. The decision of the Circuit Court of Appeals herein, holding that it was unnecessary for the Price Administrator to obtain prior approval of Maximum Price Regulation No. 169 before taking any action with respect thereto is contrary to the language expressed in section 3(a) of the Emergency Price Control Act of 1942, as amended June 30th, 1944, and is contrary to the manifest intentions of the Legislature.

3. The decision of the Circuit Court of Appeals held that the 1944 amendment of the aforementioned Emergency Price Control Act (50 U. S. C. A. Appendix—Section 924 e) sets up a procedure to meet all questions raised in the proceeding herein. However, the Emergency Court of Appeals mentioned that the foregoing statute has repeatedly and continually refused to pass upon the validity of Maximum Price Regulation No. 169. The said Emergency Court of Appeals has repeatedly held that they would not so pass upon any protest filed against the said Maximum Price Regulation No. 169 because, as it is claimed by the said Emergency Court of Appeals, the situation or complaints set forth in the Protests filed against Maximum Price Regulation No. 169 has been cured by Maximum Price Regulation No. 574, it is therefore submitted that the Emergency Court of Appeals has divested itself of the exclusive jurisdiction to determine the validity of Maximum Price Regulation No. 169. Therefore the questions presented herein are properly before this Court.

WHEREFORE your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the Circuit

Court of Appeals for the Second Circuit, forthwith to certify and send to this Court a full and complete transcript of the records and proceedings of said Court had in the cause numbered and entitled on its docket "No. 40111 of the August Term, 1944 United States of America, Plaintiff-Appellee against Robert Lieberman, Defendant-Appellant and James Nolan, Defendant" to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as to this Court may seem just and proper.

Dated: May 10th, 1946.

JACK KRANIS,
Counsel for Petitioner.

A. HARRY WEISSMAN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1218

ROBERT LIEBERMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION

I

Opinions Below

The opinion is reproduced at length in Appendix "A" hereto annexed.

II

Jurisdiction

1. The date of the Judgment to be reviewed is May 10th, 1946.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347(a)).

III

Statement of Facts and Questions Presented

The facts and questions involved have already been stated in the preceding petition, which statement is hereby adopted and made a part of this brief.

Point I

The Information Was Filed Contrary to the Statute and the Prosecution Is Unauthorized as it Lacks the Required Statutory Certificate to the Attorney-general.

Congress clearly defined a crime in Title 50, U. S. C. Appendix, Section 925(b) by a definition and a punishment and provided that when the Administrator had reason to believe that any person was liable to punishment thereunder, he may certify the facts to the Attorney-General, who in his discretion could cause appropriate proceedings to be brought. A person liable to punishment thereunder could only be one who violated its provisions. To hold that a routine prosecution by the United States Attorney will lie, is to make meaningless the provision for the Attorney-General's discretion.

In enacting this section, it is clear that Congress intended to put a substantial check upon the Office of Price Administration. It did not intend that every petty violator of a ceiling price should be subject to a jury trial in the United States Courts and it placed in the wise and capable hands of the Attorney-General the discretion to pass upon the facts and the offense, and direct appropriate proceedings to be brought, if any.

There is no denial that the facts were not certified to the Attorney-General and it is respectfully urged that the filing of the Information was unauthorized and that the prosecution is in violation of the statute.

Point II

The Regulation Never Became Effective and Is Invalid, Lacking the Statutory Approval of the Secretary of Agriculture.

Section 2 of the Emergency Price Control Act of 1942 (C. 26, 56 Stat. 23; 50 U. S. C. A. APP., Section 902), subject to certain reservations applying to agricultural commodities and products processed therefrom, purports to authorize the Price Administrator to fix maximum prices of various commodities, including meats.

Section 3(c) of the Act (Section 903(c) of 50 U. S. C. A. APP.) qualifies the authority of the Price Administrator, as to commodities processed or manufactured from any agricultural commodity, as follows:

> "No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefore specified in subsection (a)."

It cannot be doubted that a side of beef, and other meat products, such as are mentioned and described in the Information, are processed from an agricultural commodity, that is, live stock. This is made clear by Section 3 of the Inflation Control Act of 1942 (Section 963 of 50 U. S. C. A. APP.), which provides, *inter alia*:

> "that in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing"

the Congress thus making certain that livestock shall be classified as an agricultural commodity.

The beef is in its original state and is the result of slaughtering a steer and cutting and dividing it into parts. No change, chemical or otherwise, takes place. Nothing is added nor subtracted from it. It is placed in cold storage for the very purpose of keeping its identity and quality.

Commonwealth v. *Clark,* 344 Pa. 155, 25 Atl. (2d) 143;
Florida Packing & Ice Co. v. *Carney,* 51 Fla. 190;
Kennedy v. *State Board,* 224 Iowa 405, 276 N. W. 205.

The authority of the Administrator to regulate the prices of agricultural commodities, and of products processed from such commodities, was limited narrowly to such regulations as should be approved by the Secretary of Agriculture. Section 3(e) of the Act (Section 903(e), 50 U. S. C. A. App.) provides:

> "notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture * * *."

Examination of Regulation No. 169(7) (Fed. Reg. No. 10381) shows that it was never approved by the Secretary of Agriculture, or by the Food Administrator, as required by law, at any of the times mentioned in the Information. In the absence of such approval, Regulation No. 169 never became effective and valid. Hence, an information based thereon, as here, does not charge an offense against the laws of the United States.

Point III

Regulation No. 169 Was Rescinded by Regulation No. 574

The defendant is charged with violating Regulation No. 169, on June 6, 1944, and June 12, 1944. At that time the Regulation fixed maximum prices for wholesalers but placed no ceiling on live cattle, which could be sold at any

price. In June, 1944, wholesalers were required to pay more for their products than they were allowed to charge for them.

On January 29, 1945, the Administrator issued Maximum Price Regulation No. 574 fixing a ceiling on live cattle.

In answer to protests filed against Regulation No. 169, the Administrator took the position that Regulation No. 574 eliminated any argument that Regulation No. 169 was invalid because it failed to fix ceiling on live cattle.

It is urged that at the time of the offense herein Regulation No. 169 was arbitrary, unfair and ruinous to a wholesaler. He had to buy and handle beef and sell at a price less than he paid. It was so clearly invalid that the only answer to it was Regulation No. 574. The promulgation of No. 574 must be taken as an admission of the invalidity of Regulation No. 169. The alleged crime herein was on June 6 and 10, 1944, and Regulation No. 169 was then in effect. Regulation No. 574 became effective January 29, 1945. We contend that the Administrator in effect rescinded Regulation No. 169 and declared it invalid by reason of the absence of ceilings on live cattle prior to January 29, 1945, and therefore its invalidity existed in June, 1944, and the Information herein failed to charge an offense.

Conclusion

For the reasons set forth, it is respectfully submitted that the District Court erred in refusing to grant the motion in arrest of judgment and the motion to vacate and set aside the judgment.

Respectfully submitted,

JACK KRANIS,
Counsel for Petitioner,

A. HARRY WEISSMAN,
Of Counsel.

Dated: May 10, 1946.

APPENDIX "A"

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

against

JULIUS TANTLEFF, ROBERT LIEBERMAN, IRVING MALBIN, MILTON KALLENBERG and MILTON WEIL, Defendants-Appellants

Before L. Hand, Clark and Frank, Circuit Judges

Appeals from the District Court of the United States for the Eastern District of New York

Julius Tantleff, Robert Lieberman, Irving Malbin, Milton Kallenberg, and Milton Weil were each convicted of violating maximum price regulations established under the Emergency Price Control Act of 1942, Sec. 2, 30 U. S. C. A. Appendix, Sec. 902, and they appeal. Affirmed.

Henry G. Singer, of Brooklyn, N. Y. for appellant Julius Tantleff.

Joseph H. Wackerman, of Brooklyn, N. Y., for Appellant Robert Lieberman.

Morris E. Packer, of Brooklyn, N. Y. (Neil M. Lieblich, of New York City, on the brief), for appellant Irving Malbin.

Louis J. Castellano, of Brooklyn, N. Y. (Sam S. Seitz of Brooklyn, N. Y. on the brief for Milton Weil), for appellants Milton Kallenberg and Milton Weil.

Vine H. Smith, Asst. U. S. Atty. of Brooklyn, N. Y. (J. Vincent Keogh, U. S. Atty. and Maurice Z. Bungard, Asst. U. S. Atty., both of Brooklyn, N. Y. on the brief), for the United States, appellee.

CLARK, Circuit Judge:

While the defendants pleaded guilty to the respective informations filed against them, they preserved their objections of law by seasonable motions to quash the informa-

tions, in arrest of judgment and for vacation of judgment. As to each defendant the main claim of error is that the price regulation he was found to have violated, Revised Maximum Price Regulation No. 169, for the wholesale prices of beef, issued under the Emergency Price Control Act of 1942, Sec. 2, 30 U. S. C. A. Appendix, Sec. 902, was invalid for lack of the prior approval of the Secretary of Agriculture which is required for a regulation of an "agricultural commodity" under Sec. 903 (e) of the Act. In answer to the contention that such a claim could be raised only before the specially constituted Emergency Court of Appeals, under the decision in Yakus *v.* United States, 321 U. S. 414, they urge that this is the one matter of the regulation void "on its face" left open in that case. But even that matter seems no longer open, in view of the 1944 amendment to 50 U. S. C. A. Appendix, Sec. 924 (e), establishing a procedure (not sought here) designed to meet all questions raised by the Court and providing for stay of the criminal proceedings while the issue of validity is raised in good faith before the special Court. At least that was our express holding in United States *v.* George F. Fish, Inc., 2 Cir. Feb. 8, 1946. Moreover, the cases are quite clear that this particular claim is not within the area reserved by the Court for future decision. Rosensweig *vs.* United States, 9 Cir. 144 F. 2d 30, certiorari denied 323 U. S. 764; Bowles *vs.* American Brewery, 4 Cir. 146 F. 2d 842; Shrier *vs.* United States, 6 Cir. 149 F. 2d 606, certiorari denied 66 S. Ct. 34; Bowles *vs.* Dairymen's League Co-Op. Ass'n, D. C. S. D. N. Y. 61 F. Supp. 358.

Other contentions are without merit. That the Administrator may certify facts of violation to the Attorney General, "who may, in his discretion, cause appropriate proceedings to be brought" under Sec. 925 (b) of the Act, certainly does not change the normal method of instituting criminal proceedings in the United States Courts or require special allegations in the information. See the well-reasoned statement in United States *v.* Ganz, D. C. Mass., 48 F. Supp. 323, followed in United States *v.* Friedman, D. C. Conn. 50 F. Supp. 584, and United States, *v.* Harris, D. C. W. D. Pa., 54 F. Supp. 543. The regulation can hardly be held repealed by implication by a later regulation covering a differ-

ent field—live cattle and calves—or by the Administrator's citation of this new regulation in denying defendants' protests; nor would a repeal bar prosecution for an earlier violation, United States *v.* Hark, 320 U. S. 531, 536.

Convictions affirmed.

(4631)

MAY 10 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1219

IRVING MALBIN,

Petitioner,

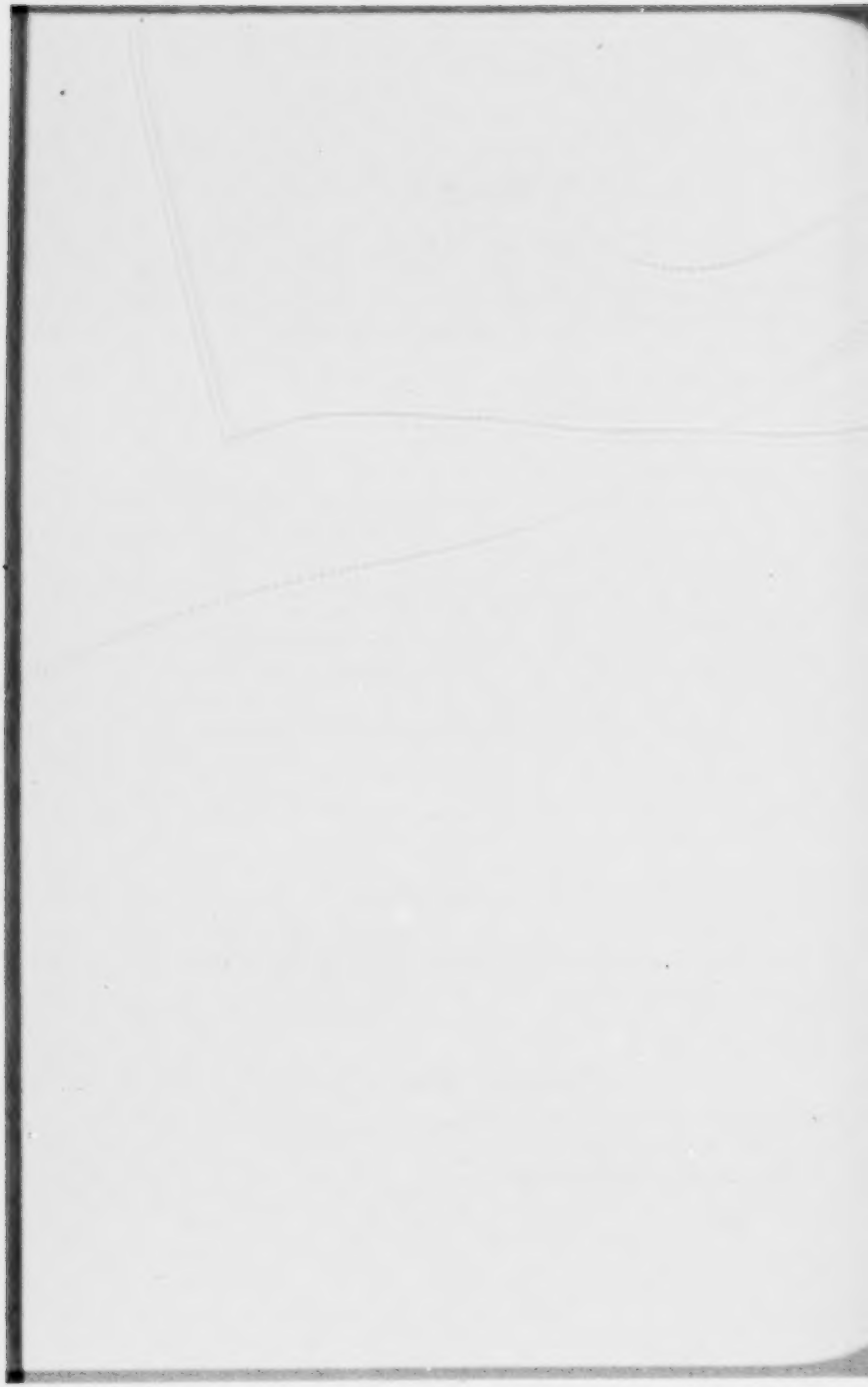
vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JACK KRANIS,
Counsel for Petitioner.

A. HARRY WEISSMAN,
Of Counsel.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1219

IRVING MALBIN,

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THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I

Summary Statement of the Matter Involved

This is a criminal case commenced by the filing of an Information in the Office of the Clerk of the United States District Court, Eastern District of New York, on August 31st, 1944.

The information originally contained 17 counts charging the defendant with having sold various quantities and types of meat in violation of the Emergency Price Control Act of 1942. The 17th count of the Information charging failure to keep complete and accurate records was dismissed on motion of the United States Attorney.

There has been no change of parties. On July 2, 1945, the defendant pleaded guilty to Counts 1-16 inclusive of the Information before the Hon. Mortimer W. Byers, the United States District Judge.

On July 12, 1945, the defendant was sentenced to be imprisoned for three months each on Counts 1-16 inclusive to run concurrently and to pay a fine of $1,000.00. A motion in arrest of judgment was denied.

The defendant was released on bail by the Hon. Augustus N. Hand, United States District Judge, on motion in the sum of $1,000.00 pending appeal, which bond was posted in the office of the Clerk, United States District Court, Eastern District of New York. The fine of $1,000 was paid in escrow into the office of the said Clerk.

The petitioner herein appealed from the judgment to the Circuit Court of Appeals for the Second Circuit, which affirmed with an opinion (See Appendix "A").

Questions Presented

1. Did the Court err in imposing sentence and entering the judgment of conviction in view of the fact that the Information failed to charge an offense against the United States and that the facts alleged do not support a judgment of conviction?

2. Did the court err in denying the motion in arrest of judgment which was made after the entry of the plea of guilty and after the sentence?

3. Do the facts set forth in counts 1 through 16 of the Information constitute or allege an offense against the United States?

Reasons Relied Upon For Allowance of Writ

1. The great importance of the Emergency Price Control Act of 1942 and the effect of the Stabilization Act of 1942, amendatory thereof to the United States, to the business world and legal profession, and the need of an authoritative opinion, particularly as to the conflicting penal provisions of these Acts, calls for a construction of the Acts by this Court.

2. The decision of the Circuit Court of Appeals herein, holding that it was unnecessary for the Price Administrator to obtain prior approval of Maximum Price Regulation 169 before taking any action with respect thereto is contrary to the language expressed in Section 3(a) of the Emergency Price Control Act of 1942, as amended June 30th, 1944, and is contrary to the manifest intentions of the Legislature.

3. The decision of the Circuit Court of Appeals held that the 1944 amendment of the aforementioned Emergency Price Control Act (50 U. S. C. A. Appendix Section 924e) sets up a procedure to meet all questions raised in the proceeding herein. However, the Emergency Court of Appeals mentioned that the foregoing statute has repeatedly and continually refused to pass upon the validity of Maximum Price Regulation No. 169. The said Emergency Court of Appeals has repeatedly held that they would not so pass upon any protest filed against the said Maximum Price Regulation No. 169 because, as it is claimed by the said Emergency Court of Appeals, the situation or complaints set forth in the Protests filed against Maximum Price Regulation No. 169 has been cured by Maximum Price

Regulation No. 574. It is therefore submitted that the Emergency Court of Appeals has divested itself of the exclusive jurisdiction to determine the validity of Maximum Price Regulation No. 169. Therefore the questions presented herein are properly before the Court.

Wherefore your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, forthwith to certify and send to this Court a full and complete transcript of the records and proceedings of said Court had in the cause numbered and entitled on its docket "No. 40112 of the August Term, 1944 United States of America, Plaintiff-Appellee against Irving Malbin, d/b/a Malbin Packing Company, Defendant-Appellant," to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as to this Court may seem just and proper.

Dated: May 10th, 1946.

JACK KRANIS,
Counsel for Petitioner.

A. HARRY WEISSMAN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1219

IRVING MALBIN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION

I

Opinions Below

The opinion is reproduced at length in Appendix "A" hereto annexed.

II

Jurisdiction

1. The date of the judgment to be reviewed is May 10th, 1946.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347 (a)).

III

Statement of Facts and Questions Presented

The facts and questions involved have already been stated in the preceding petition, which statement is hereby adopted and made a part of this brief.

Point I

The Information Was Filed Contrary to the Statute and the Prosecution Is Unauthorized as it Lacks the Required Statutory Certificate to the Attorney-General.

Congress clearly defined a crime in Title 50, U. S. C. Appendix, Section 925 (b) by a definition and a punishment and provided that when the Administrator had reason to believe that any person was liable to punishment thereunder, he may certify the facts to the Attorney-General, who in his discretion could cause appropriate proceedings to be brought. A person liable to punishment thereunder could only be one who violated its provisions. To hold that a routine prosecution by the United States Attorney will lie, is to make meaningless the provisions for the Attorney-General's discretion.

In enacting this section, it is clear that Congress intended to put a substantial check upon the Office of Price Administration. It did not intend that every petty violator of a ceiling price should be subject to a jury trial in the United States Courts and it placed in the wise and capable hands of the Attorney-General the discretion to pass upon the facts and the offense, and direct appropriate proceedings to be brought, if any.

There is no denial that the facts were not certified to the Attorney-General and it is respectfully urged that the filing of the Information was unauthorized and that the prosecution is in violation of the statute.

Point II

The Regulation Never Became Effective and Is Invalid, Lacking the Statutory Approval of the Secretary of Agriculture.

Section 2 of the Emergency Price Control Act of 1942 (C. 26, 56 Stat. 23; 50 U. S. C. A. APP. Section 902), subject to certain reservations applying to agricultural commodities and products processed therefrom, purports to authorize the Price Administrator to fix maximum prices of various commodities, including meats.

Section 3(c) of the Act (Section 903(c) of 50 U. S. C. A. APP.) qualifies the authority of the Price Administrator, as to commodities processed or manufactured from any agricultural commodity, as follows:

> "No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a)."

It cannot be doubted that a side of beef, and other meat products, such as are mentioned and described in the Information, are processed from an agricultural commodity; that is, live stock. This is made clear by Section 3 of the Inflation Control Act of 1942 (Section 963 of 50 U. S. C. A. APP.), which provides, *inter alia:*

> "That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing,"

the Congress thus making certain that livestock shall be classified as an agricultural commodity.

The beef is in its original state and is the result of slaughtering a steer and cutting and dividing it into parts. No change, chemical or otherwise, takes place. Nothing is added nor subtracted from it. It is placed in cold storage for the very purpose of keeping its identity and quality.

Commonwealth v. *Clark*, 344 Pa. 155, Atl. (2d) 143;
Florida Packing & Ice Co. v. *Carney*, 51 Fla. 190;
Kennedy v. *State Board*, 224 Iowa 405, 276 N. W. 205.

The authority of the Administrator to regulate the prices of agricultural commodities, and of products processed from such commodities, was limited narrowly to such regulations as should be approved by the Secretary of Agriculture. Section 3(e) of the Act (Section 903(e), 50 U. S. C. A. APP.) provides:

> "notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture * * *."

Examination of Regulation No. 169 (7 Fed. Reg. No. 10381) shows that it was never approved by the Secretary of Agriculture, or by the Food Administrator, as required by law, at any of the times mentioned in the Information. In the absence of such approval, Regulation No. 169 never became effective and valid. Hence, an Information based thereon, as here, does not charge an offense against the laws of the United States.

Point III

Regulation No. 169 Was Rescinded by Regulation No. 574

The defendant is charged with violating Regulation No. 169, on June 6, 1944, and June 12, 1944. At that time the Regulation fixed maximum prices for wholesalers but placed no ceiling on live cattle which could be sold at any

price. In June, 1944, wholesalers were required to pay more for their products than they were allowed to charge for them.

On January 29, 1945, the Administrator issued Maximum Price Regulation No. 574 fixing a ceiling on live cattle.

In answer to protests filed against Regulation No. 169, the Administrator took the position that Regulation No. 574 eliminated any argument that Regulation No. 169 was invalid because it failed to fix ceiling on live cattle.

It is urged that at the time of the offense herein Regulation No. 169 was arbitrary, unfair and ruinous to a wholesaler. He had to buy and handle beef and sell at a price less than he paid. It was so clearly invalid that the only answer to it was Regulation No. 574. The promulgation of No. 574 must be taken as an admission of the invalidity of Regulation No. 169. The alleged crime herein was on June 6 and 10, 1944, and Regulation No. 169 was then in effect. Regulation No. 574 became effective January 29, 1945. We contend that the Administrator in effect rescinded Regulation No. 169 and declared it invalid by reason of the absence of ceilings on live cattle prior to January 29, 1945, and therefore its invalidity existed in June 1944, and the Information herein failed to charge an offense.

Conclusion

For the reasons set forth, it is respectfully submitted that the District Court erred in refusing to grant the motion in arrest of judgment and the motion to vacate and set aside the judgment.

Respectfully submitted,

JACK KRANIS,
Counsel for Petitioner,

A. HARRY WEISSMAN,
Of Counsel.

Dated: May 10, 1946.

APPENDIX "A"

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

against

JULIUS TANTLEFF, ROBERT LIEBERMAN, IRVING MALBIN, MILTON KALLENBERG and MILTON WEIL, Defendants-Appellants

Before L. Hand, Clark and Frank, Circuit Judges

Appeals from the District Court of the United States for the Eastern District of New York

Julius Tantleff, Robert Lieberman, Irving Malbin, Milton Kallenberg, and Milton Weil were each convicted of violating maximum price regulations established under the Emergency Price Control Act of 1942, Sec. 2, 30 U. S. C. A. Appendix, Sec. 902, and they appeal. Affirmed.

Henry G. Singer, of Brooklyn, N. Y. for appellant Julius Tantleff.

Joseph H. Wackerman, of Brooklyn, N. Y., for Appellant Robert Lieberman.

Morris E. Packer, of Brooklyn, N. Y. (Neil M. Lieblich, of New York City, on the brief), for appellant Irving Malbin.

Louis J. Castellano, of Brooklyn, N. Y. (Sam S. Seitz of Brooklyn, N. Y. on the brief for Milton Weil), for appellants Milton Kallenberg and Milton Weil.

Vine H. Smith, Asst. U. S. Atty. of Brooklyn, N. Y. (J. Vincent Keogh, U. S. Atty. and Maurice Z. Bungard, Asst. U. S. Atty., both of Brooklyn, N. Y. on the brief), for the United States, appellee.

CLARK, Circuit Judge:

While the defendants pleaded guilty to the respective informations filed against them, they preserved their objections of law by seasonable motions to quash the informa-

tions, in arrest of judgment and for vacation of judgment. As to each defendant the main claim of error is that the price regulation he was found to have violated, Revised Maximum Price Regulation No. 169, for the wholesale prices of beef, issued under the Emergency Price Control Act of 1942, Sec. 2, 30 U. S. C. A. Appendix, Sec. 902, was invalid for lack of the prior approval of the Secretary of Agriculture which is required for a regulation of an "agricultural commodity" under Sec. 903(e) of the Act. In answer to the contention that such a claim could be raised only before the specially constituted Emergency Court of Appeals, under the decision in Yakus *v.* United States, 321 U. S. 414, they urge that this is the one matter of the regulation void "on its face" left open in that case. But even that matter seems no longer open, in view of the 1944 amendment to 50 U. S. C. A. Appendix, Sec. 924 (e), establishing a procedure (not sought here) designed to meet all questions raised by the Court and providing for stay of the criminal proceedings while the issue of validity is raised in good faith before the special Court. At least that was our express holding in United States *v.* George F. Fish, Inc., 2 Cir. Feb. 8, 1946. Moreover, the cases are quite clear that this particular claim is not within the area reserved by the Court for future decision. Rosenweig *v.* United States, 9 Cir. 144 F. 2d 30, certiorari denied 323 U. S. 764; Bowles *v.* American Brewery, 4 Cir. 146 F. 2d 842; Shrier *v.* United States, 6 Cir. 149 F. 2d 606, certiorari denied 66 S. Ct. 34; Bowles *v.* Dairymen's League Co-Op. Ass'n. D. C. S. D. N. Y. 61 F. Supp. 358.

Other contentions are without merit. That the Administrator may certify facts of violation to the Attorney General, "who may, in his discretion, cause appropriate proceedings to be brought" under Sec. 925 (b) of the Act, certainly does not change the normal method of instituting criminal proceedings in the United States Courts or require special allegations in the information. See the well-reasoned statement in United States *v.* Ganz, D. C. Mass., 48 F. Supp. 323, followed in United States *v.* Friedman, D. C. Conn., 50 F. Supp. 584, and United States *v.* Harris, D. C. W. D. Pa., 54 F. Supp. 543. The regulation can hardly be held repealed

by implication by a later regulation covering a different field—live cattle and calves—or by the Administrator's citation of this new regulation in denying defendants' protests; nor would a repeal bar prosecution for an earlier violation, United States *v.* Hark, 320 U. S. 531, 536.

Convictions affirmed.

Supreme Court, U. S.
FILED
JUN 7 1946
CHARLES ELMORE CROPLEY
CLERK

Nos. 1218 and 1219

In the Supreme Court of the United States

OCTOBER TERM, 1945

ROBERT LIEBERMAN, PETITIONER

v.

THE UNITED STATES OF AMERICA

IRVING MALBIN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (No. 1218, R. 30–32; No. 1219, R. 34–36) is not yet reported.

JURISDICTION

The judgments of the circuit court of appeals were entered April 10, 1946 (No. 1218, R. 32–33;

No. 1219, R. 36–37). The petitions for writs of certiorari were filed May 10, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

QUESTIONS PRESENTED

1. Whether a direction for prosecution by the Attorney General upon a certification of the pertinent facts by the Price Administrator is a condition precedent to the institution of a criminal prosecution for violation of the Emergency Price Control Act.

2. Whether, in such a criminal prosecution, the defendant is entitled to challenge the validity of a price regulation he is charged with having violated.

STATUTE INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, are set forth in the Appendix, *infra*, pp. 7. 9-12

STATEMENT

On August 31, 1944, separate informations were filed against petitioners in the District Court for the Eastern District of New York charging them with wilfully making sales of meat at wholesale at prices in excess of those permitted by Revised Maximum Price Regulation No. 169, issued on

December 10, 1942, by the Office of Price Administration (7 F. R. 10381–10389), in violation of the Emergency Price Control Act of 1942 (No. 1218, R. 5–7; No. 1219, R. 7–19). Petitioner Lieberman pleaded guilty to counts 2 and 3 of the information against him (No. 1218, R. 3), and on June 5, 1945, he was sentenced on count 2 to imprisonment for sixty days and fined $2,500, and on count 3 to imprisonment for 6 months. Execution of the sentence on count 3 was suspended, and he was placed on probation for a period of 18 months. (No. 1218, R. 21–22.) Petitioner Malbin pleaded guilty to counts 1 to 16, inclusive, of the information against him (No. 1219, R. 5), and on July 12, 1945, he was sentenced to imprisonment for 3 months on each count, the sentences to run concurrently, and on count 1 he was fined $1,000 (No. 1219, R. 27–28).

Prior to the imposition of sentence upon him, petitioner Lieberman filed a motion in arrest of judgment on the grounds, *inter alia*, that Revised Maximum Price Regulation No. 169 never became effective because it was issued by the Office of Price Administration without the approval of the Secretary of Agriculture, as required by Section 3 (e) of the Act (*infra*, p. 4); that the regulation had been rescinded by Directive No. 28 issued on or about January 10, 1945, by the Director of the Office of Economic Stabilization, and by Maximum Price Regulation No.

574 issued by the Office of Price Administration (*infra*, p. 4); and that the information had been filed without the prior approval of the Attorney General upon certification of the facts to him by the Price Administrator (No. 1218, R. 9–12). This motion was denied by the district court (No. 1218, R. 19). Lieberman's oral motion to vacate the sentence on the same grounds was also denied (R. 1218, R. 20). Petitioner Malbin also moved, prior to the imposition of sentence, in arrest of judgment on the ground that "at the time of the alleged crime the regulations had in effect been set aside"; the motion was denied (No. 1219, R. 20–23).

On appeal to the Circuit Court of Appeals for the Second Circuit, each petitioner's conviction was affirmed in a single opinion (No. 1218, R. 30–33; No. 1219, R. 34–37).

ARGUMENT

1. Petitioners contend (No. 1218, Pet. 8; No. 1219, Pet. 6) that the prosecutions must fail because there was no showing that the Price Administrator had certified the pertinent facts to the Attorney General and that the latter had thereupon directed the filing of the informations; they assert that under Section 205 (b) of the Emergency Price Control Act (*infra*, p. 4), such directions were conditions precedent to the institution of the prosecutions. This contention is plainly without merit.

Section 205 (b), the penal section of the Act, provides that "Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought." The court below held, and we think its holding was clearly correct, that this provision "certainly does not change the normal method of instituting criminal proceedings in the United States courts or require special allegations in the information" (No. 1218, R. 32). As the court said in *United States* v. *Ganz*, 48 F. Supp. 323, 327 (D. Mass.), the first sentence of section 205 (b) provides the criminal sanctions for violations of the Act, and the sentence in question merely grants to the Administrator discretionary authority to certify the facts to the Attorney General; its purpose was to make clear that the Administrator could not himself initiate criminal prosecutions. See also *United States* v. *Harris*, 54 F. Supp. 563, 564 (W. D. Pa); *United States* v. *Friedman*, 50 F. Supp. 584, 585 (D. Conn.).

2. Petitioners also contend that Revised Maximum Price Regulation No. 169 is invalid because it was issued by the Price Administrator without the approval of the Secretary of Agriculture, which, they claim, was required by Section 3 (e) of the Act (*infra*, p. 7) (No. 1218, Pet. 9–10; No. 1219, Pet. 7–8); and, further, that the regu-

lation was retroactively rescinded on January 29, 1945, a date subsequent to the violations alleged in the information (No. 1218, Pet. 8–9; No. 1219, Pet. 10–11). It is plain, we submit, as the court below held (No. 1218, R. 31), that these contentions are not open to petitioners in these criminal prosecutions, even under the decision in *Yakus* v. *United States,* 321 U. S. 414, for they do not go to the constitutional validity of the regulation on its face. Cf. *Case* v. *Bowles,* No. 261, this Term, decided February 4, 1946, slip opinion, p. 3. See also *Rosensweig* v. *United States,* 144 F. 2d 30, 32–33 (C. C. A. 9), certiorari denied, 323 U. S. 764, No. 442, O. T. 1944, and *Shrier* v. *United States,* 149 F. 2d 606, 608 (C. C. A. 6), certiorari denied October 8, 1945, No. 162, this Term, and our briefs in opposition in those cases. Furthermore, by the amendment of June 30, 1944, of the Emergency Price Control Act, Congress added Section 204 (e) (*infra,* p. —), which provides, *inter alia,* that, upon application by the defendant in a criminal prosecution within five days after judgment of conviction, the criminal court shall grant leave to the defendant to object to the validity of the regulation in the Emergency Court of Appeals, if it finds that the objection is made in good faith and there is a reasonable excuse for the defendant's failure to have objected to the regulation before the Price Administrator; and that, if the Emergency Court of Appeals thereafter sustains the defendant's objection, the criminal

proceeding shall be dismissed. This amendment made it clear, as the court below pointed out (No. 1218, R. 31), that all attacks upon the validity of price regulations are committed in the first instance to the exclusive jurisdiction of the Emergency Court of Appeals. See also *Old Monastery Co. v. United States,* 147 F. 2d 905, 906 (C. C. A. 4), certiorari denied October 8, 1945, No. 229, this Term, and our brief in opposition in the *Shrier* case, *supra,* pp. 6–7.

In any event, it is evident that the statutory requirement of approval by the Secretary of Agriculture was inapplicable in the case of Revised Maximum Price Regulation No. 169, for that regulation established maximum prices for beef and veal carcasses and wholesale cuts. Such commodities are products processed from agricultural commodities as to which the prior approval of the Secretary of Agriculture was not required. *United States* v. *Charney,* 50 F. Supp. 581, 583 (D. Mass.); and see our brief in opposition in the *Rosensweig* case, *supra,* pp. 7–11.

Nor is there any merit in the claim that Revised Maximum Price Regulation No. 169 was revoked by Directive No. 28, issued by the Director of the Office of Economic Stabilization on January 10, 1945 (10 F. R. 552), and by Maximum Price Regulation No. 574, issued by the Price Administrator on January 29, 1945 (10 F. R. 1270–1278). The directive ordered the Price Administrator to issue not later than January 29, 1945, a price

regulation "establishing overriding ceiling prices for the sale and delivery of cattle and calves * * * and maximum amounts which slaughterers may pay for cattle purchased during each monthly accounting period." Regulation No. 574, which was issued pursuant to the directive, established overriding ceiling prices for live bovine animals and maximum amounts which slaughterers might pay for cattle. It is clear that the directive and Regulation No. 574 did not revoke Regulation No. 169; the former apply in terms only to live cattle, whereas the latter applies to processed meat. Furthermore, as the court below held (No. 1218, R. 32) on the authority of *United States* v. *Hark,* 320 U. S. 531, 536, where a similar contention was urged, a repeal of the regulation would not bar prosecution for earlier violations.

CONCLUSION

The cases were correctly decided below. There are no questions of importance or conflict of decisions involved. It is respectfully submitted, therefore, that the petitions for writs of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
LEON ULMAN,
Attorneys.

JUNE 1946.

APPENDIX

The pertinent provisions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23; 58 Stat. 632; Public Law 108, approved June 30, 1945, 79th Cong., 1st sess.; 50 U. S. C. App., Supp. IV, 901 *et seq.*) are as follows:

> SEC. 3. (e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 [investigations] and under section 205 [injunctions and criminal prosecutions] to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.
>
> SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section

202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

SEC. 201. (b) * * * but, notwithstanding any provision of this or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator * * *.

SEC. 204. (a) * * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 *of this Act or section 37 of the Criminal Code,*[1] involving alleged violation of any provision of

[1] The words in italics were added by Public Law 108, approved June 30, 1945.

any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated *or conspired to violate*. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. * * *

(2) In any proceeding brought pursuant to section 205 *of this Act or section 37 of the Criminal Code,* involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

* * * * *

* * * If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effec-

tive in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 *of this Act or section 37 of the Criminal Code;* nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.

* * * * *

SEC. 205. (b) Any person who willfully violates any provision of section 4 of this Act, * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

U. S. GOVERNMENT PRINTING OFFICE: 1946